No. 82-1477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and TONY T. KUNIMURA, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF HAWAII

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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April 6, 1983

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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

The Committee to Save Nukolii (the "Committee") has filed a motion to dismiss or affirm. The Committee is the only party in this proceeding adverse to the appellants.[1] The County of Kauai and the Mayor have advised, by letter to the Clerk of this Court, that they support the position of the appellants on this appeal.[2]

[1] The listing required under Rule 28.1 of the Rules of this Court is set forth in the Jurisdictional Statement (hereinafter cited as "J.S.") at ii, and remains unchanged. Appellants have been advised that Tony T. Kunimura has succeeded Eduardo E. Malapit as Mayor and, accordingly, the caption of this case has thus been changed pursuant to Rule 40.3 of the Rules of this Court.

[2] The Developers have released any possible claims against the County for increased construction costs arising from the delay in completing the project during the period following the decision of the Hawaii Supreme Court, including the period required for review and consideration by this Court. The Developers also have covenanted not to sue the County for any of the prior events relating to the project if the County supports the Developers on this appeal and the Developers prevail and are permitted to complete the project.

The Attorney General of the State of Hawaii has filed a brief *amicus curiae* in support of the position of the appellants.

The Committee's brief in support of its motion to dismiss or affirm (hereinafter cited as "Br.") contains virtually no discussion of the merits of the constitutional questions raised on this appeal. Instead, the brief is devoted, almost entirely, to a discussion of what it calls "threshold" procedural requirements (Br. at 6), followed by an attempt to show that the questions presented are "unique" to the case at bar (Br. at 12). Even as to these points, the Committee's brief ignores the discussion of the very same matters in the Jurisdictional Statement and fails to distinguish or even discuss the controlling decisions of this Court cited in the Jurisdictional Statement.

ARGUMENT

I.

The barriers to review which have been asserted by the Committee all have been discussed previously in the Jurisdictional Statement. They are phantoms.

The Committee's claim that there has been no "final" judgment is inaccurate for the reasons set forth in the Jurisdictional Statement (J.S. at 2 n.2, 13–15). The decision being appealed from falls into at least two of the four categories of cases discussed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). First, notwithstanding the remand to the State Circuit Court as to remedy, the federal constitutional questions on appeal here have been *conclusively* decided by the Hawaii Supreme Court. 420 U.S. at 479. Second, the federal constitutional issues, as decided by the Hawaii Supreme Court, will survive and require decision regardless of the outcome of the future State Circuit Court proceedings. 420 U.S. at 480. The Hawaii Supreme Court has ruled that "enforcement of the 1980 Referendum . . . does not offend . . . constitutional guarantees" and that "the Developers have no constitutional claim that

a taking has occurred" (J.S. at A–25).[3] It instructed the State Circuit Court to "enter summary judgment for [the Committee]", to "order revocation of the condominium and hotel building permits", and to "restrain any further construction on the Nukolii site" (*id.*). Where the highest court of a state has definitively determined the constitutional questions presented, its decision is reviewable by this Court, notwithstanding a remand for further proceedings—including "even entire trials", 420 U.S. at 479. Hence, the Committee's claim that any further state proceedings may be "extensive and evidentiary" (Br. at 5) is simply irrelevant in determining whether there has been a "final judgment" within the meaning of 28 U.S.C. § 1257.[4]

The Committee also states—as did the Developers (J.S. at 14)—that there was no briefing by any party on the federal constitutional questions prior to the Hawaii Supreme Court's decision (Br. at 6). What the Committee ignores is that the Hawaii Supreme Court in fact determined the federal constitutional issues. This removed any conceivable doubt as to this Court's jurisdiction (J.S. at 15). As this Court has stated:

> We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments, a question which appellee asserts is not properly before us because appellant did not raise it on his state appeal. But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and

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[3] *Compare San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), cited by the Committee (Br. at 4–5), in which the state court had *not* "decided whether any taking in fact had occurred." 450 U.S. at 633. Similarly, in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917) (Br. at 4), there was no final judgment because the amount of "just compensation" for the condemned land remained to be determined, 243 U.S. at 256. By contrast, in the case at bar, since the Hawaii Supreme Court found that there was no "taking", there is simply no question of "just compensation" before the State Circuit Court; and, in any event, an action in "inverse condemnation" is not available in the Hawaii state courts (J.S. at 12 n.11).

[4] The Committee argues, disingenuously, that on remand "any completed structure may be allowed to remain" (Br. at 5 n.2). But that is a *non sequitur*, since the hotel stands *uncompleted*, with construction halted (J.S. at 11, 20–21).

decided it. That is sufficient under our practice. *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

Finally, the Committee makes the bizarre statement that the Hawaii Supreme Court rendered its federal constitutional holdings "in passing" (Br. at 8, 10). It is undenied that the Hawaii Supreme Court devoted the first sections of its decision to the construction of the referendum provisions involved and their application to the facts at bar. However, the court then went on to determine whether its construction of these provisions met federal constitutional requirements (J.S. at A–22–A–25). In that regard, the Hawaii Supreme Court expressly held that: (a) its construction and application of the 1980 Referendum and the referendum provisions of the Charter "satisfied constitutional requirements" (J.S. at A–23); (b) the result reached comports with the Fifth and Fourteenth Amendments, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (J.S. at A–25); (c) "zoning by referendum is compatible with due process", citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (J.S. at A–23);[5] and (d) "the Developers have no constitutional claim that a taking has occurred" (J.S. at A–25). (*See also* J.S. at 14). The Committee's refusal to discuss these holdings is telling and simply underscores the undoubted jurisdiction of this Court to review the judgment of the Hawaii Supreme Court.

II.

The Committee devotes the remainder of its brief to arguing that the case involves "factual" matters and "unique issues". Again, the Committee fails to come to grips with what the facts are[6] and what the Hawaii Supreme Court did.

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[5] *Eastlake* is also cited by the Hawaii Supreme Court in two other places (J.S. at A-8, A-14).

[6] Space does not permit a refutation of all of the Committee's misstatements of fact. Among the most egregious of these are: (a) the Committee states that it obtained certification "immediately" after the Developers' property was zoned for resort use (Br. at 2), whereas certification in fact occurred on January 30, 1980 (J.S. at 8, A-5, A-82), almost a year to the day after the February 2, 1979 zoning

A graphic example concerns the discussion of the condominium building permit, which in fact was issued on August 5, 1980—three months (J.S. at 8, A–6), not four days (Br. at 3), prior to the general election. The Hawaii Supreme Court found that, although the building permit was issued in August, it was predicated upon an approval from the State's Health Department which, although obtained, would have been revoked if the Developers had not proposed a plan for an alternative sewage disposal site—which the Developers did and which plan was finally approved on October 31, 1980—before the general election (J.S. at A–21 n.19). Certainly, there can be no question on these facts as to the Developers' reliance on the various permits obtained; and even the Committee must concede that the entire issue was moot by the time of the Referendum.

Likewise, the Committee's claim that the Developers have used "wildly exaggerated figures" is belied by the record—the $4.3 million in expenditures prior to the 1980 general election are all documented in the record before the Hawaii Supreme Court and are explained in the Jurisdictional Statement (J.S. at 11; *see also id.* n.9).

The Committee proffers additional purported "findings" by the Hawaii Supreme Court, none of which justifies the decision below. Thus, that the Nukolii site may border land that is not zoned "resort" (Br. at 10) is hardly "unique" to the Developers' property and is not a justification for the result reached. Irrespective of the asserted rationality of the "rezoning", there has been a taking in the constitutional sense because the Developers simply had gone

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(J.S. at 7, A-5, A-83-A-86); (b) the Committee states that the Developers "misrepresent[ed]" the sewage system to be used (Br. at 3), whereas the Hawaii Supreme Court found that the Developers "candidly" stated that their initial submission was proposed "on an interim basis" (A-21 n.18); (c) the Committee states that at the time of the Referendum "no work at all had begun" on the hotel (Br. at 3, 13), whereas by then the entire site—including the hotel—had been cleared, grubbed and graded (J.S. at 11), and the Developers had completed numerous improvements connected with the *entire* project (J.S. at 11-12); and (d) the Committee states that the "Kauai County Charter and the relevant referenda provisions therein are peculiar to that single island" (Br. at 12), whereas exactly the opposite is true, both within the State of Hawaii (Brief of State of Hawaii, at 7) and elsewhere (J.S. at 29 n.18).

too far to be "rezoned" out of their project and were deprived of their "distinct investment-backed expectations". *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979); *Penn Central, supra.* And—with respect to the issue that does concern the selective nature of the restriction imposed—what is critical is not the treatment of bordering areas, but that the 1980 Referendum effected a down-zoning for one single spot in a clear deviation from Kauai's—and Hawaii's—comprehensive land-use planning scheme (J.S. at 7, 28–29).

The Committee's statement that the Developers' conduct undermined the "orderly development permit process" (Br. at 8) is untrue. Prior to the certification of the Referendum petition, the Developers had an undisputed right to take the various steps necessary to use their property as zoned. The Developers' expenditures began well prior to certification of the Referendum petition (J.S. at 11 n.9). After certification, each of the government officials concerned and the State Circuit Court, in all of its decisions, not only permitted the Developers to continue to obtain the necessary approvals and permits for such development—which they did (J.S. at 9–10, A–32–A–68)—but also construed Section 5.11 of the Charter as protecting these expenditures regardless of the result of the Referendum vote. Even the Hawaii Supreme Court, while giving the Referendum retroactive effect, did not deny that the Developers had a right to proceed as they did. To state that the Developers engaged in a "race" undeserving of constitutional protections (Br. at 4, 13) is not to state a question of "fact"; it is the assertion, in rhetorical terms, of an erroneous principle of constitutional law. Indeed, the Committee's argument that the Developers engaged in a "race" can be applied to any developer who does not consent to halt activity while an anti-development group conducts a referendum. In other words, the argument assumes the conclusions that: (a) the Developers' expenditures before certification are unworthy of constitutional protection, (b) after certification, the Developers' activities lose constitutional protection because the Developers should have anticipated the "freeze" retroactively imposed by the Hawaii Supreme Court's decision, and (c) that "freeze" itself is constitutional.

It is not disputed that the Hawaii Supreme Court determined that the Developers "proceeded at risk" after certification (J.S. at

A–19) and that their substantial expenditures in that period were "speculative" (J.S. at A–20–A–21). However, the Developers proceeded "at risk" only because the Hawaii Supreme Court held—retroactively and in acknowledged rejection of the literal statutory language—that the Developers' expectations for use of their property could not be taken into account once the 1980 Referendum petition was certified as having been signed by the requisite number of voters, *i.e.*, twenty percent of those eligible to vote at the 1978 general election (J.S. at 21–22, A–24). Whether the Developers' property use can be put "at risk" in the circumstances presented is a central part of the decision of the Hawaii Supreme Court which is called into question on this appeal.

III.

The Committee predicts that the issues in this case "are very likely never to arise again" (Br. at 12). But dispassionate observers, including the State of Hawaii, entertain an entirely contrary view, setting forth effects which have already become both widespread and pernicious. The reason is evident. If the decision below is left to stand, any referendum mechanism can be misused in the same way as in the case at bar. Apart from the spate of constitutional issues which are likely to arise, the ultimate effect can only be to stop legitimate development before it begins.

IV.

A party which argues that there can be no "taking" because, at the time of the Referendum, the Developers "had barely commenced the foundations of the condominiums" (Br. at 13),[7] has not paused to understand *Kaiser Aetna v. United States*, *supra*, or the other applicable decisions of this Court (J.S. at 18–20).

In view of the remarkable result reached by the Hawaii Supreme Court, the clear conflict with applicable decisions of this Court,

[7] In fact, development had progressed substantially beyond that point (J.S. at 11).

the fact that both the County of Kauai and the State of Hawaii also urge reversal of the decision below, and the Committee's evident inability to justify (or even discuss) that decision in light of prior precedent, we respectfully urge that summary reversal is warranted.

CONCLUSION

For the reasons set forth in this Reply Brief and in the Jurisdictional Statement, appellee Committee's motion to dismiss or affirm should be denied. We respectfully request this Court to note probable jurisdiction of this appeal or, alternatively, to grant certiorari. In view of the clear conflict presented with prior decisions of this Court and the absence of justification by any party for the decision below on the merits of the constitutional questions presented, the Court should consider summary reversal in lieu of plenary briefing and argument.

April 6, 1983

Respectfully submitted,

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